

# Comment

## Attorney Fees in Contract Disputes in Ohio: *Nottingdale Homeowners' Association, Inc. v. Darby*

### I. INTRODUCTION

On October 14, 1987, the Ohio Supreme Court handed down a decision that could drastically affect the practice of commercial law in the state of Ohio. The court in *Nottingdale Homeowners' Association, Inc. v. Darby*<sup>1</sup> held that parties could, in a contract for the purchase of a condominium, provide for the payment of attorney fees in the event litigation arose over the negotiated agreement.<sup>2</sup> This holding is contradictory to the American rule as it has been applied in the state of Ohio for almost 150 years. The traditional American rule is that all litigants must pay their own legal fees,<sup>3</sup> regardless of the outcome of the case. Ohio has consistently followed this rule with two exceptions: attorney fees could be recovered if provided for by statute or if the opponent acted in bad faith.<sup>4</sup> Contractual stipulation of legal fees is another exception to the American rule that has been followed by the majority of jurisdictions in this country, but not by Ohio, until now. This Comment will argue that *Nottingdale* should be read as a case that permits the contractual stipulation exception to the American rule in Ohio.

In Part II, this Comment will explain the facts of the *Nottingdale* case and its holding. Part III will give a brief history of the American rule and outline the traditional exceptions to it, focusing mainly on the contractual stipulation exception. Part IV will discuss the law as it stood in Ohio before *Nottingdale*. Part V will canvass the relevant law in other states and countries. Finally, Part VI will discuss the effect of *Nottingdale* on Ohio law.

### II. *NOTTINGDALE HOMEOWNERS' ASSOCIATION, INC. V. DARBY*

#### A. *The Facts*

Mr. and Mrs. Keith Darby entered into a contract to purchase a condominium in the Nottingdale development in 1978. The Darbys agreed in the contract to abide by all the covenants and conditions placed upon them under the Nottingdale Homeowners' Association bylaws, titled the Declaration of Condominium Ownership.<sup>5</sup> One provision stated that all unit owners were responsible for

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1. 33 Ohio St. 3d 32, 514 N.E.2d 702 (1987).

2. *Id.* at 33, 514 N.E.2d at 704.

3. See Comment, *Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?*, 56 *FORDHAM L. REV.* 487 (1987).

4. *Nottingdale Homeowners' Ass'n., Inc. v. Darby*, 33 Ohio St. 3d 32, 33, 514 N.E.2d 702, 704 (1987).

5. *Id.* at 32, 514 N.E.2d at 703.

paying monthly assessment fees which would cover, among other things, maintenance of the common grounds, trash and snow removal, water and sewer service, and liability insurance. Another provision provided for the payment of attorney fees by a condominium unit owner in the event of a successful collection or foreclosure action against the condominium owner by the Homeowners' Association. The Darbys failed to pay their monthly assessment fees, and the Homeowners' Association prevailed in a subsequent collection action.<sup>6</sup>

The Homeowners' Association argued that the Darbys should be forced to pay the legal fees of the Association as provided for in the Declaration of Condominium Ownership. The trial court held that the contract should be enforced as written and ordered the Darbys to pay their opponent's attorney fees. The appellate court affirmed the decision on the merits but reversed the decision of the trial court relating to attorney fees on the basis that attorney fees in Ohio are recoverable only where statutorily mandated or where the opponent acts in bad faith.<sup>7</sup>

### B. *The Court's Holding*

After hearing the appeal, the Ohio Supreme Court, in a 4-3 decision, held that the provisions in the condominium bylaws requiring that the unit owner pay the attorney fees of the Homeowners' Association in either a collection or foreclosure action against the defaulting unit owner for unpaid assessments are enforceable and not void as against public policy so long as the fees awarded are fair, just, and reasonable.<sup>8</sup>

### C. *The Court's Reasoning*

The court's reasoning was simple and direct:

[T]his court will not interfere with the right of the people of this state to contract freely and without needless limitation. A rule of law which prevents parties from agreeing to pay the other's attorney fees, absent a statute or prior declaration of this court to the contrary, is outmoded, unjustified, and paternalistic.<sup>9</sup>

The Ohio Supreme Court also relied upon comment d to section 356 of the Restatement of the Law (Second), Contracts (1981) 160, which provides in part, "although attorneys' fees are not generally awarded to the winning party, if the parties provide for the award of such fees the court will award a sum that it considers reasonable."<sup>10</sup>

The court acknowledged the American rule and noted that agreement to pay attorney fees by contractual stipulation was an exception to the rule followed by the majority of jurisdictions in the United States. The court went on to state, "It has long been recognized that persons have a fundamental right to contract freely with the expectation that the terms of the contract will be en-

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6. *Id.* at 32-33, 514 N.E.2d at 703-04.

7. *Id.* at 33, 514 N.E.2d at 704.

8. *Id.* at 37, 514 N.E.2d at 707.

9. *Id.* at 37, 514 N.E.2d at 706-07.

10. *Id.* at 34, 514 N.E.2d at 704.

forced.”<sup>11</sup> It added, “This freedom ‘is as fundamental to our society as the right to write and speak without restraint.’”<sup>12</sup> The “right to contract freely” theory urged by the court was directly contradictory to decisions in prior cases decided by the same court, as will be discussed in Part III.

The broad language used by the court may leave the local practitioner with the impression that all attorney fee provisions she has put into contracts in the past may now be enforceable. But the Ohio Supreme Court used the rest of the opinion to discuss condominium instruments specifically, and labeled the contract a “non-commercial” transaction.<sup>13</sup> The court was concerned with the continuing operation of condominium homeowners’ associations if provisions for the payment of legal fees by the condominium unit owner are not enforceable. The court stated that “[b]y refusing to enforce the provision which would require [the Darbys] to pay the [Homeowners’ Association’s] reasonable attorney fees, this court would make it virtually impossible for condominium unit owners’ associations to recoup unpaid assessments from recalcitrant unit owners.”<sup>14</sup> Therefore, a unit owner would have very little incentive to pay his monthly assessments, knowing that collection would be prohibitively expensive. Consequently, the court reasoned that the fee-shifting arrangement stipulated to by the parties protects the fund of the homeowners’ association from potential bankruptcy, and protects the conscientious contributors from the burden of paying for the delinquency of others.<sup>15</sup> Whether the precedent set in *Nottingdale* is meant to apply to all contracts, to just condominium instruments, or to contracts that are analogous to condominium instruments remains to be seen and will be discussed fully in Part VI.

There was a vigorous dissent by three justices in *Nottingdale*. They believed that the majority was going too far in allowing an exception to the traditional American rule and emphasized that the *only* two exceptions to the rule allowed by law in Ohio are the statutory exception and the bad faith exception.<sup>16</sup> The dissent stated that the majority’s decision had “no basis in Ohio law and defies simple logic. Furthermore, the decision perpetuates the *modern* ‘American’ rule: *sue, sue, sue*.”<sup>17</sup> The three dissenting justices also argued that the parties were not of equal bargaining power; therefore, the contractual term, providing for the payment of attorney fees if the agreement was litigated, was not entered into voluntarily and freely.<sup>18</sup> Because of unequal bargaining power, the Darbys could not demand that the term providing for legal fees be stricken from the contract as in normal negotiations. The dissent would have held, there-

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11. *Id.* at 36, 514 N.E.2d at 705.

12. *Id.* at 36, 514 N.E.2d at 705-06 (quoting *Blount v. Smith*, 12 Ohio St. 2d 41, 47, 231 N.E.2d 301, 305 (1967)).

13. *Id.* at 35, 514 N.E.2d at 705.

14. *Id.* at 36, 514 N.E.2d at 706.

15. *Id.* at 37, 514 N.E.2d at 706.

16. *Id.* at 37, 514 N.E.2d at 707. It appears the dissent does not take note of the Supreme Court’s power to change the law.

17. *Id.* (emphasis in original).

18. *Id.* at 39, 514 N.E.2d at 708.

fore, that the clause providing for legal fees in the parties' agreement was void and against public policy.<sup>19</sup>

### III. THE AMERICAN RULE

The policy that each litigant to a lawsuit must bear her own costs and legal fees, regardless of the outcome of the suit, is unique to the American system.<sup>20</sup> The English rule holds that the prevailing party in a lawsuit may recover costs and attorney fees from the other side, at the discretion of the court.<sup>21</sup> This section of the Comment will provide a brief history of the rule and some rationales for it, and explain the recognized exceptions for the rule, particularly the contractual stipulation exception.

#### A. *Origins of the American Rule*

Early in our country's history, the English rule was followed.<sup>22</sup> This changed in the late 1700s, and commentators have given a variety of reasons for the change. Some commentators cite the distrust and hostility that early Americans felt toward lawyers and the legal profession.<sup>23</sup> The law at that time was a relatively straightforward, simple code that the layman could easily follow. Lawyers were not needed, as the poor and rich alike represented themselves in legal matters; the lawyer, in turn, was seen as an expensive luxury.<sup>24</sup> Others have suggested the fierce, intense individualism of the American pioneers was the basis for these ill feelings:

In our early days, the pioneer's very existence depended upon his individual ability to cope with the particular situation at hand. It was only natural that when legal disputes arose, he relied upon himself to achieve justice inside the courtroom, or outside it, rather than upon those "characters of disrepute" who demanded payment for their services.<sup>25</sup>

Professor Ehrenzweig has suggested that abandonment of the English rule was due merely to an historical accident: state legislatures placed fixed limits on amounts of legal fees that could be recovered; these limits were not increased in accordance with inflation. As such, they soon became nominal and were eventually forgotten.<sup>26</sup> Still another theory behind the American rule is the early colonists' dislike for all things British, and the effort to purge early America of all English influences.<sup>27</sup>

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19. *Id.* at 39, 514 N.E.2d at 709.

20. See Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637 (1974).

21. See Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1218 (1967).

22. *Id.*

23. *Id.* at 1219.

24. See Comment, *supra* note 20, at 641.

25. Note, *supra* note 21, at 1220.

26. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966). See generally Comment, *supra* note 20, at 642; Talmadge, *The Award of Attorneys' Fees in Civil Litigation in Washington*, 16 GONZ. L. REV. 57, 58 (1980).

27. See Comment, *supra* note 20, at 641.

Whatever the cause, the American rule became permanent in the United States. The United States Supreme Court first announced the rule in *Arcambel v. Wiseman*,<sup>28</sup> and adhered to it in subsequent cases, such as *Oelrichs v. Spain*.<sup>29</sup> In *Oelrichs*, the Court resolved to follow a no-fee rule.<sup>30</sup> Later cases only served to cement the understanding that all parties to litigation must pay their own way. The two most often cited cases on this point are *Fleischmann Distilling Corp. v. Maier Brewing Co.*<sup>31</sup> and *Alyeska Pipeline Co. v. Wilderness Society*.<sup>32</sup>

In *Fleischmann*, the Court ruled that attorney fees could not be recovered under a federal trademark act that enumerated certain damages that were available if the act was violated. The act provided for "costs of the action" as damages, but the Supreme Court did not read that to include counsel fees. The Court stated that, "The rule has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or *enforceable contract providing therefore*."<sup>33</sup>

In *Alyeska*, the respondents tried to recover attorney fees under the "private attorney general" exception to the American rule. This exception, to be explained fully below, was permitted by many courts, but the United States Supreme Court ruled that the exception was invalid, and that only Congress could authorize such an exception to the American rule.<sup>34</sup> As one commentator noted, "The Supreme Court's opinion in [*Alyeska*] removed all doubt that the no-fee rule constitutes a limitation on the judicial power to award attorneys' fees in the absence of statute."<sup>35</sup>

## B. Rationales for the American Rule

Various theories have been offered to justify the American rule. While the courts have declined to give solid justification for the rule,<sup>36</sup> commentators have listed several. One theory is that attorney fees are not recoverable because they are not foreseeable and therefore are not proximately caused by the defendant's behavior.<sup>37</sup> Another reason put forth is that attorney fees should not be recoverable because litigants should not be penalized for defending or prosecuting a lawsuit, because litigation is at best uncertain.<sup>38</sup> The popular justification for the American rule is that "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees

28. 3 U.S. (3 Dall.) 306 (1796).

29. 82 U.S. (15 Wall.) 211 (1872).

30. See Walthall, *Awards of Attorneys Fees in the Absence of Statute: Trends and Prospects in the Fifth Circuit*, 10 CUMB. L. REV. 359, 367 (1979).

31. 386 U.S. 714 (1967).

32. 421 U.S. 240 (1975).

33. *Fleischmann Dist. Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (emphasis added). The Court states that as part of its general rule an exception to the American rule is an enforceable contract providing for legal fees. This is the majority view in the United States but not in Ohio.

34. *Alyeska Pipeline Co. v. Wilderness Soc.*, 421 U.S. 240, 247 (1975).

35. Walthall, *supra* note 30, at 360.

36. See Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439, 440 (1986).

37. Comment, *supra* note 20, at 643.

38. *Id.* at 644.

of their opponents' counsel."<sup>39</sup> Last, the non-allowance of legal fees has been justified on the grounds that difficulties of proof inherent in litigating the question of reasonable attorneys' fees would impose substantial burdens on judicial administration.<sup>40</sup>

While there are several explanations for the American rule, there is also substantial justification for the English rule of fee-shifting. In England, unsuccessful litigation by a plaintiff or defendant is seen as "a tortious act whose perpetrator should be liable for the expenses she has caused."<sup>41</sup> Fee-shifting laws also help deter misconduct during trial, encourage meritorious civil actions that might not otherwise be commenced due to lack of funds, and promote the settling of civil disputes without litigation, thereby reducing the size of court dockets.<sup>42</sup> The English rule also allows small, meritorious claims to be brought to trial that normally would not be litigated because the legal fees would outweigh the recovery.<sup>43</sup>

An important argument for allowing an award of attorney fees to a prevailing litigant is that this is the only way the injured party can truly be made "whole." As argued by the Judicial Council of Massachusetts in 1925:

On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill? And on what principle of justice is a defendant who has been wrongfully haled into court made to pay out of his own pocket the expense of showing that he was wrongfully sued?<sup>44</sup>

According to one scholar commenting on the Judicial Council's report, "Undeniably, the American rule's effect of reducing a successful plaintiff's recovery by the amount of his lawyer's fee conflicts with the make-whole idea underlying much of the law of remedies."<sup>45</sup>

The "make-whole" argument against the American rule is rational, reasonable, and logical. The policy that "everyone pays their own way" slams the door on a basic theory of contract law. According to Mayer and Stix in their article, *The Prevailing Party Should Recover Counsel Fees*:

It has, of course, long been theorized that the essential element of our damage rules is to make the injured party "whole." No party in a breach of contract situation, for example, should be left following the breach with less in hand than he would have had if his adversary had lived up to his bargain. But realistically speaking, this is precisely what happens under the present cost and damage structure when litigation occurs.<sup>46</sup>

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39. *Fleischmann*, 386 U.S. at 718, reprinted in Comment, *supra* note 20, at 644.

40. See Walthall, *supra* note 30, at 367. Walthall claims this is the main policy reason advanced by the Supreme Court for the American rule.

The method of computing the amount to be granted as attorney fees if recovery is granted is the subject of many articles. For a comprehensive look at methods of calculating fees, see Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 462-89.

41. Leubsdorf, *supra* note 36, at 441.

42. See Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393, 394 (1988).

43. Comment, *supra* note 20, at 639.

44. *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7, 63-64 (1925), reprinted in Note, *supra* note 21, at 1221-22.

45. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 657.

46. Mayer & Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975).

### C. *Exceptions to the American Rule*

Various exceptions to the American rule have been promulgated over the years. It is widely accepted that legal fees can be recovered if mandated by statute. There are over 200 federal statutes that allow the recovery of counsel fees,<sup>47</sup> examples being anti-trust laws,<sup>48</sup> the Social Security Act,<sup>49</sup> federal trade commission acts,<sup>50</sup> and the Fair Labor Standards Act.<sup>51</sup>

Many jurisdictions recognize an exception to the American rule for litigation brought in bad faith. "Where litigation is clearly vexatious and in bad faith, the court has the equitable power to tax counsel fees and costs to the losing party."<sup>52</sup> Generally, legal fees under the bad faith exception are granted for bad faith abuses of the judicial process rather than for the conduct that caused the lawsuit.<sup>53</sup> Rule 11 of the Federal Rules of Civil Procedure includes a similar provision: when an attorney fails to conduct a reasonable inquiry into the merits of a case, the court may sanction him by requiring that he pay his opponent's fees.<sup>54</sup>

The common fund exception allows someone who has created, increased, or protected a common fund for the benefit of others to be reimbursed for his legal fees from the fund. This exception may be applied in shareholder derivative and class action suits. Courts have found it fundamentally unjust to tax solely the representative of the class with an attorney's fee when others who have also benefitted incur no such expense.<sup>55</sup>

A judicially-designed exception, the "private attorney general" exception, was created to "encourage socially beneficial litigation by awarding attorneys' fees in successful cases brought in the 'public interest,' such as civil rights cases."<sup>56</sup> The Supreme Court, in the *Alyeska* decision, struck down this exception, holding that only Congress could create such an exception through legislation.<sup>57</sup>

Finally, there is the contractual stipulation exception. Parties can typically stipulate by contract that the losing party will reimburse the other for legal fees

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47. See Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1232 (1988). See generally, H. NEWBERG, ATTORNEY FEE AWARDS (1986); J. GOODSTEIN, ATTORNEY'S FEES (1985); S. SPEISER, ATTORNEYS' FEES §§ 13:34-45 and 14:1-202 (1973).

48. 15 U.S.C. § 15 (1982) (stating that persons injured by acts forbidden by the anti-trust law can recover three-fold damages and reasonable attorney fees).

49. 42 U.S.C.A. § 406(B)(1) (West 1987) (providing that whenever a court renders a judgment favorable to a social security benefits claimant who has been represented by an attorney, the court may determine and allow as part of its judgment a reasonable attorney's fee not in excess of 25% of the total past due benefits).

50. See Gilleran & Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 A.B.A. J. 58 (May 1986).

51. 29 U.S.C. § 216(b) (1982). See also Interstate Commerce Act, 49 U.S.C. § 16 (1982); Railway Labor Act, 45 U.S.C. § 153 (1982); Packers & Stockyard Act, 7 U.S.C. § 210 (1982); Communication Act, 47 U.S.C. § 206 (1982).

52. Note, *supra* note 21, at 1227.

53. See Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana - An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1188 (1987).

54. FED. R. CIV. P. 11.

55. See generally S. SPEISER, *supra* note 47, at § 11:1-34; Dobbs, *supra* note 40, at 440-41.

56. Note, *supra* note 47, at 1232.

57. See *id.* "Congress responded by promulgating statutory 'private attorney general' exceptions to the American rule, of which over 200 are now in effect." *Id.* at 1232.

incurred in litigation due to one party breaching the contract. Although before *Nottingdale* the contractual stipulation exception was not officially recognized in Ohio, it is the rule rather than the exception in most other jurisdictions. In his treatise on attorneys' fees, Stuart Speiser states:

In most jurisdictions it is the rule, supported by hundreds of decisions, that provisions or stipulations in various contracts for payment of attorneys' fees in the event it is necessary to resort to the aid of counsel for enforcement or collection are valid and enforceable.<sup>58</sup>

Another commentator states that the contractual stipulation exception is one of few common law exceptions to the rule that has general application.<sup>59</sup> Even the United States Supreme Court has stated that "attorney's fees are not ordinarily recoverable in the absence of a statute or *enforceable contract providing therefor*."<sup>60</sup> Currently, there are only eight states, including Ohio, that expressly prohibit parties to a contract from agreeing to pay each other's legal fees.<sup>61</sup>

The force behind the contractual stipulation exception is the right of freedom to contract. Williston stated:

If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by the courts of justice.<sup>62</sup>

#### IV. THE LAW IN OHIO BEFORE *NOTTINGDALE*

It is useful to look at the state of the law as it stood in Ohio prior to *Nottingdale*, including statutes, administrative regulations, and case law.

##### A. Statutes

In addition to the voluminous federal statutes permitting recovery of legal fees to victorious litigants,<sup>63</sup> several Ohio statutes permit recovery. For example, section 4213.06 of the Ohio Revised Code (ORC) permits the recovery of reasonable legal fees in proceedings conducted under worker's compensation laws.<sup>64</sup> In addition, ORC sections 5321.01-.02 state that in actions between landlords and tenants (particularly when a landlord has retaliated against a tenant for reporting deficiencies to the housing authority), the tenant's attorney fees can be recovered if she prevails.<sup>65</sup> Landlords can also recoup their legal fees when bringing a successful suit against a tenant.<sup>66</sup>

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58. S. SPEISER, *supra* note 47, at § 15:3.

59. Dobbs, *supra*, note 40, at 439.

60. *Fleishmann Dist. Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (emphasis added).

61. See generally, 17 AM. JUR. 2d *Contracts* § 164 (1985); S. SPEISER, *supra* note 47, at § 15:5.

62. 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1630 (3d ed. 1972 & Supp. 1980) (quoting *Printing & Numerical Registering Co. v. Sampson*, 19 L.R.-Eq. 462, 465 (M.R. 1895)).

63. See *supra* note 47 and accompanying text.

64. OHIO REV. CODE ANN. § 4123.06 (Baldwin 1978).

65. *Id.* at § 5321.01. Recovery under this statute when a landlord acts in retaliation combines both the statutory and bad faith exceptions to the American rule.

66. *Id.* at § 5321.02 (B)(3).



The Uniform Commercial Code (UCC), which has been adopted in its entirety by Ohio<sup>67</sup> and incorporated into the Ohio Revised Code, indirectly provides for attorney fees in several sections, particularly those regarding commercial transactions and contracts between parties. For example, UCC section 2-718(1) states:

[D]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.<sup>68</sup>

In *Equitable Lumber Corp. v. IPA Land Development Corp.*,<sup>69</sup> the parties had a liquidated damages clause in a sales contract that provided for recovery of attorney's fees in case of default by the buyer. The New York Court of Appeals, in applying Article 2 (Sales) of the UCC (and specifically section 2-718(1)), treated the attorney fee provision like any other liquidated damages provision that might be found in a sales contract.<sup>70</sup> Section 2-719 provides that the agreement between the parties may provide for remedies in addition to or in substitution for those provided in the UCC.<sup>71</sup> Both sections 2-718(1) and 2-719, while not mentioning attorney fees directly, imply that the parties to a contract can agree beforehand on the remedies to be available to either party in case of breach. Contracts, therefore, will reflect the parties' negotiated terms, and if the payment of legal fees in case of breach is one of them, the courts ought to let it stand. The courts always have UCC section 2-302 available, which allows them to strike any unconscionable clause from a contract (in the event legal fee terms are unreasonable).

Statutes providing for the recovery of legal fees are very important for the potential litigant. Because they are one of the accepted methods of fee-shifting in Ohio, parties thinking of filing suit must be aware of them to take advantage of them.

## B. *Administrative Regulations*

Various sections of the Ohio Administrative Code (OAC) permit attorney fees to be recovered. For example, OAC section 1501:13-14-04(Q)(1) states that any person may file a petition for attorney fees and costs incurred in connection with any administrative proceeding under O.R.C. Chapter 1513: Coal Surface Mining.<sup>72</sup> As with the similar state statutes, potential litigants must be aware of administrative regulations that allow for the recovery of legal fees in order to make use of them.

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67. The newly promulgated Article 2A - Leases has not yet been adopted by Ohio.

68. U.C.C. § 2-718(1) (1988). See OHIO REV. CODE ANN. § 1302.92 (Baldwin 1978).

69. 38 N.Y.2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (1976).

70. Comment, *A New Standard for Liquidated Damage Provisions Under the Uniform Commercial Code?*, 38 OHIO ST. L.J. 437 (1977).

71. U.C.C. § 2-719. See OHIO REV. CODE ANN. § 1302.93.

72. OHIO ADMIN. CODE § 1501:13-14-04(Q)(1) (1987).

### C. Case Law

Ohio's case law concerning contracts to pay attorney fees dates back to at least 1841. The traditional American rule was applied in *State v. Taylor*,<sup>73</sup> where the Supreme Court of Ohio held that a stipulation by the parties to a contract which permits attorney fees to be awarded as costs of collection upon default is void and "against the public policy of the country, and ought not to be enforced in courts of justice."<sup>74</sup> The court apparently saw this arrangement as usurious, created solely to get around the restrictions that existed at the time on rates of interests on loans.<sup>75</sup> By providing, for example, that five percent of the amount of the loan could be collected as attorney fees upon default, an interest rate of seven percent effectively became an interest rate of twelve percent upon default. Countless cases succeeding *Taylor* classified agreements to pay legal fees as "void and against public policy." As recently as September 1987, the Supreme Court of Ohio explained its position on why Ohio's public policy forbids contracts for the payment of counsel fees upon default in payment of a debt:

When a stipulation to pay attorney fees is incorporated into an ordinary contract, lease, note, or other debt instrument, it is ordinarily included by the creditor or a similar party to whom the debt is owed and is in the sole interest of such party. In the event of a breach or other default on the underlying obligation, the stipulation to pay attorney fees operates as a penalty to the defaulting party and encourages litigation to establish either a breach of the agreement or a default on the obligation. In those circumstances, the promise to pay counsel fees is not arrived at through free understanding and negotiation.<sup>76</sup>

Other cases in Ohio through the years have consistently refused to alter the American rule or to add a new exception to it.<sup>77</sup> Some cases state that if the policy of not allowing contractual stipulation to pay attorney fees is to be abrogated, it must be done by the legislature;<sup>78</sup> others say it is a job for the Supreme Court.<sup>79</sup> In *Chaunticlair Phase IV A Condominium Association v. Howard*,<sup>80</sup> the same factual situation existed as in *Nottingdale*, but the Eighth Appellate District of Ohio came to the opposite conclusion. Although a clause in the condominium bylaws permitted the homeowners' association to recover attorney fees if a unit owner failed to pay monthly assessment fees and legal action had

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73. 10 Ohio 378 (1841).

74. *Id.* at 381.

75. *Id.* at 380-81.

76. *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St. 3d 238, 242, 513 N.E.2d 253, 257-58 (1987).

77. *See generally* *Motorists Mutual Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973) (attorney fees are usually not recoverable in an action for breach of contract, but may be recovered when an insurer wrongfully refuses to defend an action against its insured); *Francisco v. Tallman*, No. C-860235, slip op. (5th App. Dist. of Ohio 1986) (attorney fees are not recoverable in action for breach of contract); *Bates v. Bd. of Elections*, No. 87AP-108, slip op. (10th App. Dist. of Ohio 1987) (attorney fees are not awarded to the prevailing party in the absence of a demonstration of bad faith litigation).

78. *See Sorin v. Bd. of Educ.*, 46 Ohio St. 2d 177, 347 N.E.2d 527 (1976).

79. *See Buller v. Respicare*, No. 86AP-964, slip op. (10th App. Dist. of Ohio 1986).

80. No. 50549, slip op. (8th App. Dist. of Ohio 1986).

to be taken for collection, the court declined to modify the American rule to permit legal fees by contractual stipulation.<sup>81</sup>

On the eve of *Nottingdale*, however, three cases were decided that indicated that change was in the air. In *DiSanto v. Birchfield Homes, Inc.*,<sup>82</sup> the parties had a clause in their sales agreement which provided that the loser in a lawsuit brought to enforce the agreement would be required to pay the legal fees of the successful party in litigation. The Eleventh Appellate District Court of Ohio upheld the clause and awarded counsel fees to the prevailing party.<sup>83</sup> In the case of *Wyoming Condominium Unit Owners Association v. Solomon*,<sup>84</sup> the same factual situation existed as in *Nottingdale*. A unit owner refused to pay his share of the monthly assessment fees, and according to the contract signed by the parties (the "declaration of condominium ownership"), the Unit Owners Association could bring suit to recover the deficit and recover the attorney fees incurred in doing so.<sup>85</sup> The First Appellate District of Ohio awarded attorney fees to the plaintiff in accordance with the contract between the parties.<sup>86</sup> In so holding, the court expressly rejected the lower court opinion in *Nottingdale* that held against the payment of attorney fees by contractual stipulation. The *Wyoming* court stated, "We decline to follow [the lower court opinion in] *Nottingdale* because we do not believe it is well founded."<sup>87</sup> Finally, in *Worth v. Aetna Casualty & Surety Co.*,<sup>88</sup> decided just seven weeks before the *Nottingdale* decision, the Ohio Supreme Court reversed an appellate court holding that provisions in indemnity agreements for reimbursement of legal expenses are void and against public policy.<sup>89</sup> The court held that:

[A]n indemnitor's express agreement to indemnify an indemnitee for qualified legal expenses incurred is enforceable and is not contrary to Ohio's public policy. In the event that the indemnitor wrongfully refuses to honor its obligation, the indemnitee may recover its legal expenses.<sup>90</sup>

In all of the cited cases, the parties had contracts that included terms for legal fees reimbursement should the agreement be litigated. The high court seems to be telling Ohio that legal fee stipulations are void in debt and loan contracts but not in other types of commercial contracts.

## V. THE LAW IN OTHER JURISDICTIONS

Ohio officially allows two exceptions to the American rule: attorney fees can be awarded if mandated by statute or if litigation is brought in bad faith. Other states are quite different. In the State of Louisiana, for example, the only two exceptions recognized are the statutory and contractual stipulation excep-

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81. *Id.*

82. No. 11-273, slip op. (11th App. Dist. of Ohio 1987).

83. *Id.*

84. No. C-860245, slip op. (1st App. Dist. of Ohio 1987).

85. *Id.*

86. *Id.* •

87. *Id.*

88. 32 Ohio St. 3d 258, 513 N.E.2d 253 (1987).

89. *Id.* at 239, 513 N.E.2d at 255.

90. *Id.* at 242, 513 N.E.2d at 257 (emphasis added).

tions.<sup>91</sup> In Washington, legal fees given by statute, by contractual stipulation, by the common fund exception, and by the bad faith exception are allowed.<sup>92</sup> The State of New Jersey allows exceptions to the American rule for attorney fees given by statute, rule of court, or contract.<sup>93</sup>

Two jurisdictions, Alaska and Nevada, have gone against the grain and have partially repudiated the American rule. In Alaska, courts have discretion to award legal fees to a party recovering a money judgment.<sup>94</sup> In Nevada, courts have discretion to award attorney fees in actions involving \$10,000 or less.<sup>95</sup> These two states are alone in America as followers of the English rule.

As for other nations, "[i]n virtually every country outside the United States, courts have awarded and continue to award attorneys' fees to the prevailing party in ordinary lawsuits."<sup>96</sup> In England and the Commonwealth countries, the English rule is followed. Attorneys submit an affidavit containing their fees and costs after the termination of the litigation. If there is a dispute as to the itemized affidavit, a taxing master is appointed by the court to decide which items are reasonable and will be paid.<sup>97</sup> "Moreover, if the tortfeasor or contract breaker refuses to honor the legitimate demands of the ultimately successful party and forces the latter to resort to litigation, he is considered to have increased the damages inflicted."<sup>98</sup> Under the English system:

[T]he trial judge has the discretion to deny costs, or even to award them to a losing party in a case (as happens) where the "loser" has really won or the successful suit is unjustified. In other unusual circumstances, fees may be denied or even charged to the prevailing party where, for example, a plaintiff refuses a fair settlement offer and recovers less after trial.<sup>99</sup>

On the Continent, the typical system provides that the loser of a lawsuit is usually responsible for paying at least part of the winner's attorney fees.<sup>100</sup> In Belgium, for example, successful litigants are awarded legal fees, but the amounts are fixed by statute, regardless of the amount of the actual fees.<sup>101</sup>

## VI. THE EFFECT OF *NOTTINGDALE* IN OHIO

The legal effect of *Nottingdale* in Ohio remains to be seen. As of the time of this writing, only one Ohio case has cited *Nottingdale* for the proposition that attorney fees can be provided for by contract. On the other hand, no cases have rejected *Nottingdale* or overruled it as against public policy.

91. See Comment, *supra* note 53.

92. See Comment, *The Award of Attorney's Fees to Prevailing Defendants Under the Washington Long Arm Statute*, 63 WASH. L. REV. 125, 127 n. 11 (1988).

93. See *Cohen v. Fair Lawn Dairies, Inc.*, 86 N.J. Super. 206, 206 A.2d 585, *aff'd* 44 N.J. 450, 210 A.2d 73 (1965).

94. See ALASKA R. CIV. P. 82(a) (1987).

95. See NEV. REV. STAT. § 18.010 (1967).

96. See Comment, *supra* note 20, at 639.

97. See Mayer & Stix, *supra* note 46, at 430.

98. *Id.* at 430-31 (quoting Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400, 401 (1963)).

99. *Id.* at 430-31.

100. See Comment, *supra* note 92, at 126.

101. *Id.* at 126 n.3.

The single case citing *Nottingdale* in a positive manner is *ATEC, Inc., v. Columbia Portland Cement Corp.*<sup>102</sup> In this case, the parties had an equipment lease that contained a clause which stated that upon default by the lessee, the lessor could repossess and sell the equipment, holding the lessee liable for all legal fees.<sup>103</sup> Upon default, the lessor brought suit and was awarded legal fees. The Tenth Appellate District of Ohio upheld the award of attorney fees according to the contract between the parties, citing *Nottingdale* and stating, "attorney fees may be recovered by the winning party when the parties have contracted for the same, and the contract is found to be enforceable."<sup>104</sup>

The case of *Gahanna v. Eastgate Properties, Inc.*,<sup>105</sup> decided in early 1988, could be read to further the contractual stipulation exception argument set forth in *Nottingdale* or it could be interpreted as setting Ohio back in its ways of nonrecognition of the legal fees by agreement exception. In *Gahanna*, the Supreme Court of Ohio held that attorney fees could not be recovered by a victorious lessee after a forcible entry and detainer suit by his lessor.<sup>106</sup> On the one hand, the court set forth the old argument that "[g]enerally, a prevailing party may not recover attorney fees as costs of litigation in the absence of statutory authority unless the breaching party has acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons."<sup>107</sup> The court was saying that the same two exceptions to the American rule still exist in Ohio and that they have not added the contractual stipulation exception to the list. This tends to favor the argument that *Nottingdale* was interpreted narrowly to apply to instruments of condominium ownership only and not to all contracts in general.<sup>108</sup>

On the other hand, the court in *Gahanna* stated as a reason for its holding that the lease agreement between the parties contained "no provision which would render [the lessor] liable for attorney fees in the event that it was unsuccessful in a forcible entry and detainer proceeding."<sup>109</sup> In effect, the court said that the parties had not agreed in their contract that a losing litigant would pay the winner's legal fees in a forcible entry and detainer suit. But if they had included such a negotiated term, the holding may have been different. If in fact this is what the court meant, then a negotiated term in a contract that provides for an award of attorney fees to the winner in a subsequent lawsuit over the contract will be enforced by the courts in Ohio. Even though this case was decided after *Nottingdale*, the Ohio Supreme Court does not refer to *Nottingdale* in its opinion.

The writing on the wall is not clear. It could be that the court is limiting the application of *Nottingdale* to "noncommercial" transactions. Or it could be that no litigants have put forth a *Nottingdale* argument to the courts as of yet.

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102. No. 88AP-380 (10th App. Dist. of Ohio 1988) (LEXIS, State Library, Ohio File).

103. *Id.* at 1.

104. *Id.* at 5-6.

105. 36 Ohio St. 3d 65, 521 N.E.2d 814 (1988).

106. *Id.* at 67, 521 N.E.2d at 817.

107. *Id.* at 66, 521 N.E.2d at 816, citing *Sorin v. Bd. of Educ.*, 46 Ohio St. 2d 177, 347 N.E.2d 527 (1976).

108. This applies to all contracts except contracts for debt. The court has clearly stated how it stands on agreements to pay attorney fees in those situations. See *supra* note 77 and accompanying text.

109. *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St. 3d 65, 67, 521 N.E.2d 814, 817 (1988).

Practicing attorneys may not be aware that the Ohio Supreme Court has decided a case in favor of contractual terms allowing attorney fees. The fact that at the time of this writing *Nottingdale* has only been cited by one Ohio court since it was handed down in October of 1987 supports this hypothesis.

## VII. CONCLUSION

Practicing attorneys in Ohio, who have regularly put terms in contracts regarding the payment of attorney fees upon breach, should no longer accept that the terms will be unenforceable, but should argue for their enforcement citing *Nottingdale*. The Ohio Supreme Court has ruled that one type of contract with stipulations for attorney fees is valid and enforceable, and cited "freedom to contract" as the main justification.<sup>110</sup> There is no reason why other types of contracts (save those for debt or loan purposes<sup>111</sup>) should not be interpreted in a similar manner if the "freedom to contract" principle is followed.

The court came to the correct decision in the *Nottingdale* case. From a "freedom to contract" standpoint, it is undisputed that parties have a right to contract with each other, as long as they enter into the contract voluntarily and its terms are not unconscionable. Whether or not the American rule ought to be abolished is another question, but as far as the recognized exception that attorney fees can be provided for by contract, Ohio has been long behind in accepting it. The majority of jurisdictions and the majority of commentators consistently hold that the contractual stipulation exception to the American rule is valid and enforceable, and for good reason. As the Ohio Supreme Court stated in *Nottingdale*, "[a] rule of law which prevents parties from agreeing to pay each other's attorney fees . . . is outmoded, unjustified and paternalistic."<sup>112</sup>

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110. *Nottingdale Homeowners' Ass'n, Inc. v. Darby*, 33 Ohio St. 3d at 32, 36, 514 N.E.2d 702, 705 (1987).

111. See *supra* note 77 and accompanying text.

112. *Nottingdale*, 33 Ohio St. 3d at 37, 514 N.E.2d at 707.